FILE COPY

Supreme Court, U. S.
FILED
OCT 4 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 108

ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

Petitioners,

vs.

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX

Table of Cases Cited.

	Page
Beach, Rec'r, v. *Mizner, Ex'r,* 131 O. S. 481	6
Brusselback v. *Cago Corporation,* 85 F. (2d) 20	4
Fulton, Supt. of Banks, State ex rel. v. *Bremer,* 130 O. S. 227	6
Hall v. *Ballard,* 90 F. (2d) 939	1
Holmberg v. *Carr,* 86 F. (2d) 727	3

Statutes Cited.

Act of June 30, 1876, c. 156, Sec. 2, 19 Stat. 63	1
12 U. S. C.. Section 65	1, 5
12 U. S. C., Sections 191 and 192	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 108

ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

Petitioners,

vs.

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

Further illustrating the conflict between decisions of different United States Circuit Courts of Appeals, petitioners call the Court's attention to the case of *Hall* v. *Ballard*, decided by the Circuit Court of Appeals for the Fourth Circuit on June 14, 1937, and reported in 90 F. (2d) 939.

In that case certain creditors of the Peoples National Bank, of Abingdon, Virginia, filed a creditors' bill in equity in the United States District Court for the Western District of Virginia, under the Act of June 30, 1876, C. 156, Section 2, 19 Stat. 63, 12 U. S. C., Section 65 (set out in appendix of this brief), against said bank and its shareholders to enforce the personal liability of said shareholders. Judgment was entered therein in favor of the complaining creditors against

the Bank, adjudging the shareholders of the Bank to be liable to the extent of $100.00 for each share owned by them, appointing a receiver and giving judgment in his favor as such receiver for the benefit of said creditors against each of the shareholders who had been served with process in the action, and making an assessment against such of the other shareholders as were not served with process in the action who were non-residents of the State of Virginia, and directing the receiver to collect enough money to discharge the judgments and costs of the proceedings from the shareholders not to exceed $100.00 for each share owned. Thereafter the receiver Hall brought an action at law in the United States District Court for the Southern District of West Virginia, against Ballard, a resident of that district, to collect the assessment on ten shares of said bank stock owned by him. Ballard filed, among others, the plea of the statute of limitations of the State of West Virginia. The District Court sustained this plea and dismissed the action and the receiver carried an appeal to the Circuit Court of Appeals for the Fourth Circuit. This statement of the facts makes apparent immediately the similarity of this case to the case at bar. Both involve the question of the proper procedure for collecting a 100% assessment of liability on bank stock previously made by a court of equity in another State against a shareholder not served with process in the action in which the assessment was made, and the question of the extraterritorial effect of a decree making such an assessment. It is to be noted that the Hall case involves an assessment of liability on national bank stock and the appointment of a receiver to collect the same by a court of equity, and not by the Comptroller of the Currency, under Sections 191 and 192, 12 U. S. C.

On consideration of the question of the extraterritorial effect of the original decree of assessment in the District Court for the Western District of Virginia, the Circuit

Court of Appeals for the Fourth Circuit, on page 946, cited with approval a case which held,

> "* * * that the non-resident stockholders of the national bank were not necessary parties to the action by the creditors under the statute (12 U. S. C. A. § 65) to determine the liability of the bank and necessity for assessment upon the stockholders upon the theory that the individual liability of the stockholders under the statute imposing the same (12 U. S. C. A. § 64) was but a guarantee to the creditors of the bank that their claims would be paid to the extent of stockholders' stock at a par value on the conditions that assets of the bank proved to be insufficient to pay its liabilities and in such a suit the decree of the United States District Court ascertaining the amount of the bank's liability and necessity for assessment upon stockholders was binding on non-resident stockholders, though they had no notice of such proceedings, upon the theory that the stockholders were integral parts of the bank and were represented by the bank in all proceedings to which the bank was a party and that an action against the non-resident stockholders to enforce the liability of such stockholders which had been determined in the original action by the creditors under the statute (12 U. S. C. A. § 65) may be brought in any jurisdiction where service may be had on such stockholders."

Counsel for the petitioners submit that the foregoing quotation shows a clear conflict between this decision and the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Holmberg et al.* v. *Carr*, 86 F. (2d) 727, in which the Court, in referring to an assessment of double liability on the stock of a joint stock land bank previously made by a District Court in Minnesota, says, at page 730:

> "Therefore we hold that the assessment in the district court has no extraterritorial effect, and that the bill should have been dismissed."

The decision of the Circuit Court of Appeals for the Fourth Circuit in *Hall* v. *Ballard, supra,* is also in conflict with the decisions of several other Circuit Courts of Appeals on the question of how and by whom an assessment of liability on bank stock previously made should be collected from a non-resident stockholder not served with process in the action in which the assessment was made. In the *Hall* case the court approved the collection of the assessment by the receiver in an action at law, saying at page 946:

> "Furthermore a court of equity has the power to appoint a receiver and authorize him to enforce stockholders' liability in actions at law. Appellant followed the procedure approved by that decision."

The decree of the District Court in Chicago, upon which the case at bar is predicated, authorized the receiver there appointed "to collect from any or all of the stockholders of said Bank the assessments hereby levied against such stockholders, whether such stockholders be parties to this suit or not, and whether such stockholders be residents of Illinois, or reside elsewhere" (R. 43). The case of *Brusselback et al.* v. *Cago Corporation et al.,* 85 F. (2d) 20, decided by the Circuit Court of Appeals for the Second Circuit, was predicated upon the same decree of the Chicago Court, set out above. The similarity of that decree to the decree of assessment involved in the *Hall* case, *supra,* is apparent. On consideration of the question of how and by whom the assessment should be collected, the Court in the *Cago* case held that an assessment so made could only be collected from shareholders in other States in actions in equity by creditors of said bank for the benefit of all of such creditors. This case was cited with approval by the Circuit Court of Appeals for the Sixth Circuit in arriving at the same conclusion in the case at bar (R. 89). The rationale of both of these decisions is that since no provision is made in the Farm Loan Act for the collection

of the assessment by a duly constituted representative of all of the creditors, the collection must be made in an equity action by some of the creditors acting for the benefit of all; and the Court distinguishes certain cases holding that an action at law may be brough to collect a 100 per cent assessment of liability on stock of a national bank on the grounds that under the National Banking Act the stockholders' liability is enforceable by a receiver, appointed by the Comptroller of the Currency. See page 23 of the decision in the *Cago* case. There a conflict between the decisions in the *Cago* case and the *Hall* case arises, for in the latter case the assessment was not one made by the Comptroller of the Currency and collectible by statute by a receiver, but rather was an assessment made by an equity court under 12 U. S. C., Section 65, which, like the Farm Loan Act, makes no provision as to how or by whom an assessment once made is to be collected. The *Hall* case holds that such an assessment made by an equity court may be collected by a receiver and in an action at law; the *Cago* case holds that it can be collected only by creditors and only in an action in equity.

Counsel for petitioners submit that the foregoing analysis shows a clear conflict in the decisions of the Second, Sixth and Fourth Circuit Courts of Appeals both as to the extraterritorial effect of a decree of assessment on double liability bank stock, and as to the manner in which such an assessment should be collected. The decision in the *Hall* case has added to the confusion which already existed with respect to the questions involved, and a situation is presented which calls for a determination of those questions by this Court.

The argument set forth by counsel for respondents under Point II in their brief is based upon such a misapprehension of the facts and of the record in the courts below that petitioners feel obliged to answer it. The defendants

in the District Court and the appellants in the Circuit Court of Appeals never argued or contended that the assessment made in the primary equity suit in the Federal District Court at Chicago was conclusive upon shareholders, non-resident of Illinois and who were not before the Court. The plaintiffs in their bill in equity in the District Court in this case pleaded, however, the assessment made in the Chicago suit previously brought by them and alleged that such assessment was conclusive and binding upon all shareholders, without regard to residence or service of process. The motions to dismiss filed by various defendants have the same effect as demurrers, and the arguments in support thereof do not, therefore, estop the defendants and the petitioners in this Court in any respect. The defendants simply contended that if the assessments made in the previous equity suit were conclusive and binding upon non-resident shareholders, not served with process and not before the Court, as the plaintiffs alleged in their own bill in this suit, such assessments were collectible only by action at law.

No argument of this kind was made, or even suggested by opposite counsel in either the District or Appellate Court, and such a statement here seems to us improper and prejudicial to petitioners.

With respect to the statement made by counsel for respondents under Point III of their brief that the Supreme Court of Ohio has held adversely to our contentions relating to the probate laws of Ohio, we simply wish to point out that the case relied upon by counsel for respondents, namely, *State ex rel. Fulton, Supt. of Banks,* v. *Bremer,* 130 O. S. 227, was decided on December 5, 1935, whereas the case relied upon by us, namely, *Beach, Rec'r,* v. *Miener, Ex'r,* 131 O. S. 481, was decided on July 15, 1936. That part of the opinion in the *Bremer* case which is quoted in the respondents' brief is clearly *dicta,* and is not mentioned in the syllabus of the opinion, which in Ohio constitutes

the law of the case. That portion of the opinion in the *Beach* case which is quoted in our original brief is clearly in point to establish the proposition contended for, to wit, that under the probate laws of the State of Ohio a petition against the executor of an estate which does not allege a presentation of the claim to the executor within four months of the date of appointment or later upon leave first obtained from the probate court does not state facts sufficient to constitute a good cause of action.

Respectfully submitted,

WELLMORE B. TURNER,
ROY G. FITZGERALD,
ROBERT E. COWDEN,
HOWARD P. WILLIAMSON,
Counsel for Petitioners.

Dated at Dayton, Ohio, September 29th, 1937.

Of Counsel for Petitioners:

NEAL HUNTER.
A. P. MERCER.
JOSEPH W. SHARTS.
HARRY L. MUNGER.
EUGENE G. KENNEDY.
HAROLD F. DEMANN.
CLEMENT V. JACOBS.
C. A. FUNKHOUSER.
BYRON MURR.
DANIEL NEVINS.
HORACE J. BOESCH.
HOLLENCAMP & LAIR.
H. L. FERNEDING.
OZIAS & OZIAS.
W. S. RHOTEHAMEL.
PICKREL, SCHAEFFER, HARSHMAN & YOUNG.
R. K. LANDIS.
IRVIN G. BIESER.
JOHN W. RATCHFORD.
MURPHY, MURPHY & MAYL.
JAMES & COOLIDGE.
F. N. R. REDFERN.
PAXTON & SEASONGOOD.
MURRAY SMITH.
F. D. SCHNACKE.
WILLIAM H. VODREY.
F. R. HOOVER.
H. N. & H. W. LILLEY.
JAMES E. THOMAS.
GROVER C. BROWN.
MILTON W. BUFFINGTON.
JOSEPH LEMKUHL.
J. C. FULLERTON, JR.
ROY G. FITZGERALD, JR.
ROBT. E. COWDEN, JR.

APPENDIX.

Section 65, Title 12, U. S. C.: "When any national banking association shall have gone into liquidation under the provisions of section 181 of this title, the individual liability of the shareholders provided for by section 63 of this title may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established. (June 30, 1876, c. 156, § 2, 19 Stat. 63.)"

Affidavit of Service.

STATE OF OHIO,
County of Montgomery, ss:

Robert E. Cowden, being first duly sworn, says that he served a copy of the foregoing Reply Brief upon George R. Murray, one of the Solicitors for Respondents herein, by handing the same to E. P. Legler, his partner, (said George R. Murray being absent from his office and residence) on September 29, 1937; and that he also mailed a copy of such Reply Brief to J. Arthur Miller, one of the Solicitors for Respondents herein, addressed to him at 33 North LaSalle Street, Chicago, Illinois, by registered mail, postage prepaid, on September 29, 1937.

ROBERT E. COWDEN.

Sworn to before me by the said Robert E. Cowden and by him subscribed in my presence this 29th day of September, 1937.

[SEAL.]

LUDWICA RATERMAN,
Notary Public in and for Montgomery County, Ohio.

My Commission Expires August 2, 1938.